United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

635

No. 22924
No. 22925

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

IRVIN L. STEVENSON and BERNARD I. WHITE, APPELLANTS

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22924

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UNITED STATES OF AMERICA,

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APPELLANTS.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the evidence insufficient to submit the case to the jury on charges of second degree burglary in view of the

conflicting testimony of the Government's witnesses?

2. Did the closing argument of the prosecutor exceed permissible bounds so as to require reversal as "plain error" under Fed. R. Crim. P. 52(b)?

3. Did the lower court err in charging the jury with the missing witnesses' instruction when no attempt was made to establish their unavailability to the Government?

4. Was the lower court's "flight" instruction erroneous and inadequate by failing to fully explain the variety of motives which might prompt flight?

The pending cases have not been previously before this Court under the same or similar title.

REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

Each Appellant was indicted on two counts charging violations of 22 D.C. Code §1801(b), second degree burglary, and 22 D. C. Code § 2202, petit larceny(C.T. 1).[1/] The indictment in pertinent part charged that 1) "On or about

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1/ "C.T." references are to the Clerk's Transcript. "1.R.T." references are to the Reporter's Transcript ofthe December 23 and 24, 1968 trial proceedings; "2.R.T."references are for the December 30, 1968 proceedings.

June 18, 1968, /Appellants/ entered the store of John Mosby, with intent to steal property of another" and 2) they "stole property of John Mosby, of the value of about $50.00, consisting of a quantity of jewelry of the value of $50.00" (C.T. 1).[2/]

After trial by a jury, Appellant Stevenson was found guilty as charged and Appellant White was found guilty of second degree burglary, but not guilty of petit larceny. Motions for a judgment notwithstanding the verdict of the jury were denied (2 R.T. 54). Each appellant was sentenced to imprisonment for a period of two to six years.

The Government's case in chief was based on the testimony of Officers Adams and Farr.[3/] On the morning of June 18, 1968, at about 5:10 a.m., the officers responded to a radio call for a "window smashing" at 1421 U Street, N.W., while in a patrol wagon proceeding north on 14th Street, N.W., in the vicinity of T Street. With Officer Farr at the wheel, they proceeded north to U Street and west to 1421 U Street to the jewelry store of John Mosby.

At the intersection of 14th and U Streets, the officers testified that while they were about 100 feet away they were able to see some three or four unidentified subjects in front

2/Appellant Stevenson's pre-trial motion to dismiss the indictment because it failed "to allege the essential element of the location of the offenses charged" (C.T. 6(d)) was denied by the lower court (C.T. 9).

3/The Government also called John Mosby, the owner of the store, to establish the identity of the jewelry as that taken from his establishment.

of the store (1 R.T. 38-39). Officer Farr stated initially that at this point he saw "some" unidentified persons reaching in through the window while others were picking items off the pavement (1 R.T. 38). On cross-examination, however, he agreed he did not know -- from that distance -- what their purposes for being there were (1R.T. 50-52).

While proceeding west on U Street toward the jewelry store (approximately in the middle of the block on the north side of the street), the officers' vision of the store scene was momentarily blocked by a large full tandem trailer truck parked in front of the store. (1 R.T. 38-39). Officer Farr then drove past the trailer truck and turned sharply to the right placing the patrol wagon directly in front of the store (1 R.T. 40). With the police vehicle's brakes squealing and lights shining on to the store front, the people scattered and fled. (1 R.T. 40, 51, 55)

Focusing on this moment in time, Officer Farr testified that he observed Mr. Stevenson "reaching through the window" (1 R.T. 41) and stated that Mr. White "had reached through" the window and was looking at something believed to be a medallion. (It is not indicated in the record that he had specifically observed appellants' activities prior to turning into the store.) Officer Adams, however, testified that at this same precise moment, he saw only one of the three or four men present with his hand in the window -- Mr. White (1 R.T. 17, 33). The

others, he testified, were "standing around" next to the window (1 R.T. 17).

The officers further testified that they then left their vehicle and pursued the fleeing suspects -- Farr chasing and apprehending White and Stevenson who allegedly fled in an easterly direction toward 14th and U Streets, and Adams chasing a suspect who ran in a southerly direction under the truck, but failing to apprehend him. (1 R.T. 20, 27). Officer Adams, moreover, was unaware if or how Farr apprehended appellants as his full attention was diverted in another direction (1 R.T. 33). Both officers testified that the jewelry recovered and later identified as coming from Mr. Mosby's Jewelry Store was taken from Stevenson (1 R.T. 20, 23, 65).

At the conclusion of the Government's case, appellants' motions for acquittal were denied (1R.T. 91). Preparatory to appellants' testimony, the lower court heard argument on the Government's intention to impeach their credibility with prior convictions (1 R.T. 73-76) and ruled against the use of the previous convictions "as being too similar in nature to use for impeachment purposes" (1 R.T. 90).

The appellants' case in chief was based solely on their testimony. Mr. White testified that on the morning in question he had just completed his regular shift as a cook in the Wings and Things restaurant -- located in the immediate vicinity of the jewelry store -- and was accompanying Miss Brewer,

a fellow worker, to the Dunbar Hotel at 15th and U Streets, N.W. (1 R.T. 96-97, 108-109). He crossed the intersection at 14th and UStreets, N.W., to the side of the street on which the jewelry store is located and there happened upon the scene taking place.

Observing four men in front of the store, Mr. White testified that one unidentified person had a hand inside the store window while the others stood nearby (1 R.T. 99, 114). He and Miss Brewer continued to walk beyond the store, he stopping to observe the men remove items while she continued to walk on to 15th Street. He then proceeded in the direction of 15th Street and stopped to tie his shoe when policemen pulled in front of the parked trailer truck and came up to him and arrested him in front of the Booker T. Theater -- approximately 8 to 9 houses away from the jewelry store (1 R.T. 112-113). He then testified he was placed in the patrol wagon alone, noted that at least four police officers were on the scene, was taken to the police station for booking, and observed that appellant Stevenson was brought into the station about 45 minutes later (1 R.T. 115, 117-118).

On cross-examination, the prosecutor questioned Mr. White about Miss Brewer, his co-worker. Mr. White testified that the last time he had seen Miss Brewer was during the "last part of the last month" at her mother's home, 918 Madison Street, N.W., where she lived at the time of the trial. (1 R.T. 107-108). The prosecutor also questioned Mr. White as to the person responsible for closing Wings and Things at 5:00 a.m., the usual closing

time for the restaurant. Identifying him as a "Mr. Burke," the assistant manager at the time, Mr. White stated that Mr. Burke was then working at the China Boy Carry-Out on Southern Avenue across the Maryland line. Mr. White stated that he had talked to Mr. Burke during the week before the trial but did not discuss any of the events which took place on the morning of June 18, 1968. Whereupon the following colloquy took place between the prosecutor and Mr. White:

> Q Didn't it occur to you that it might be a good idea to show that you in fact had worked on that morning?
>
> A I didn't understand you.
>
> Q Didn't it occur to you to show that it might be a good idea to show that you in fact were at work at Wings and Things at or about five o'clock on the morning of the 18th --
>
> MR. CARROLL: I object.
>
> THE COURT: Overruled.
>
> THE WITNESS: Well, I could.
>
> BY MR. OVERBY:
>
> Q Mr. Burke isn't here, is he?
>
> A No.
>
> Q And neither is Miss Brewer?
>
> A (Shakes head.)
>
> THE COURT: You can't just shake your head, answer yes or no.
>
> THE WITNESS: No, they are not. /I R.T. 110-111/ 4/

4/ Mr. White's counsel questioned whether the Government was contd.

Mr. Stevenson denied being involved with the crime that took place at the jewelry store. His testimony was that on the evening of June 17, 1968, he was helping the Poor Peoples' Campaign in Resurrection City. At about 4 a.m. of the morning in question he went to the center, or headquarters, located at 14th and U Streets, N.W. (1 R.T. 121; see also 1 R.T. 49). Being hungry, he went to look for food and was subsequently instructed that food could be found in the trailer truck parked on U Street. He went to inspect and saw a bag of jewelry near the truck. While looking at the contents of the bag, he testified/he was "jumped" and arrested by an unidentified officer who had been in the cab of the truck -- said officer not being either Officers Adams or Farr. Mr. Stevenson testified, moreover, that the first time he saw Mr. White was in the precinct police station in contrast with the dual apprehending testimony of Officer Farr (1 R.T. 123-124).

In his closing argument on rebuttal, the prosecutor strongly emphasized the credibility of the defendants vis-a-vis the police officers. Relevant portions of that argument include the following:

4/contd. entitled to the missing witness instruction in view of information that Miss Brewer had typed up the complaint in the police station against appellants, suggesting that this action made her the agent of the Government (2 R.T. 7; see also Mr. White's testimony that Miss Brewer had typed the "transcript" (1 R.T. 119).

"That was where he /Mr. Stevenson/ saw the bags just outside of the truck, and when he picked up the bags, the police officer -- not Farr -- some other police officer jumped out of this truck and arrested him for taking this jewelry. If you believe that, this man deserves to go free." /2 R.T. 27/

...

"...You people /the jury/ are to assess the credibility. In assessing credibility, you have to remember this point.

If you find that it happened to /sic/ way Mr. White says it happened, then Mr. Adams and Mr. Farr are out-and-out liers /sic/. They testified, as you know, both men were put in a patrol wagon and taken to the precinct. /2 R.T. 31/

...

You have heard something about joint action -- that there is no joint action here. What more joint action can you possibly have than seeing these two gentlemen commit the burglary and petit larceny. There is your joint action right there. There is no question about it.

The police officers' testimony was slanted to prove elements of burglary. The testimony was slanted to show that hands were in the window and the medallion was in Mr. White's hand. If you want to believe they didn't come here and in effect perjure themselves to that extent, you can believe that and let them walk out of here." /2 R.T. 31-32/

At the conclusion of the Government's argument, the court, in addition to the regular instructions, gave the jury instructions for a missing witness (2 R.T. 37); for flight (2 R.T. 46); and for recently stolen property for the

crimes of larceny and housebreaking (2 R.T. 46, 49). After deliberation, the jury returned verdicts of guilty on both counts for appellant Stevenson and for second degree burglary for appellant White. This appeal followed. 5/

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUBMIT THE CASE TO THE JURY ON CHARGES OF SECOND DEGREE BURGLARY.

The District of Columbia Code (22 D.C. Code §1801(b)) provides in pertinent part that in order to sustain a conviction of second degree burglary it is necessary for the Government to prove beyond a reasonable doubt that:

> * * * whoever shall, either in the night or in the daytime, break and enter or enter without breaking, any * * * store * * * whether occupied or not * * * with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree* * *.

The facts of the instant case, appellants submit, are insufficient to establish beyond a reasonable doubt that either committed the crime of second degree burglary as provided above.

A careful review of the testimony of the officers who were eye witnesses readily suggests they apparently were in no position to positively identify either appellant as breaking and entering, or entering without breaking, the store of John Hosby. Officer Farr

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5/ By order of the District Court, Appellants were granted leave to proceed on appeal without prepayment of fees or costs. C.T. 16,20.

testified that at the intersection of 14th and U Streets while "looking over" he saw several people -- whom he didn't identify -- in front of the broken window. "Some were reaching in through the window, grabbing items. Other ones were bending down, picking items up off the pavement" (1 R.T. 38; emphasis supplied).

The distance between the intersection and the store was estimated at approximately 100 feet. As he and Officer Adams turned the corner their view was momentarily blocked by the parked trailer truck. (1 R.T. 39). After clearing the truck, Officer Farr hooked his patrol wagon in front of the truck putting them "right on the scene" (1 R.T. 40). Officer Farr testified that at the time of turning the wagon in front of the truck, "The people that were there turned around and saw us and were in different arrays of scattering at that moment. Our brakes were squealing and they saw us and began to run" (1 R.T. 40; emphasis supplied).

Thus, it is clear from Officer Farr's version of what occurred that by the timehe was in a position to observe what was actually taking place in front of the store -- he had not previously indicated which of the three or four persons were "in the store" -- the persons assembled had already begun to disperse,negativing any possibility for him to make a positive identification. Officer Farr nonetheless continued to testify that "when they pulled up in front of the truck" Mr. White "had reached through and was looking" at a medallion (1 R.T. 40) andMr. Stevenson "was reaching through the window, grabbing hands full of things" until he began to move away (1 R.T. 41). Thus, it appears at the outset that Officer Farr's testimony lacks plausibility because he first has everyone

scattering yet still asserting appellants remained long enough to be observed either "reaching through the window" or having just done so. The Government failed to establish the time period in which Officer Farr's observations permitted him to testify that once his view of the scene was restored he first saw everyone scattering, yet the two appellants at that time had their hands in the window -- clearly only an assumption on his part. The weakness of Officer Farr's entire observation is pointedly displayed by his admission on cross-examination that he did not "know what all the people in front of that /Mosby's/ store were doing" (1 R.T. 52). His testimony, therefore, amounts to no more than that he apprehended two persons who fled from the scene of a crime -- as did all the "others." Such testimony, it is submitted, is insufficient to establish beyond a reasonable doubt that either appellant was positively identified inserting any part of his person into the store.

Magnifying the inconsistency of the Government's eye-witness testimony is Officer Adams' recollection of the events which transpired. Like Officer Farr, he was unable to identify any particular person from the intersection of 14th and U; and like Officer Farr, his view of the store scene was momentarily blocked by the parked trailer truck, returning only after hooking in front of the parked truck. Yet at the moment of direct confrontation described above, Officer Adams did not see Mr. Stevenson reaching through the window, but only Mr. White. The others, he testified, were "standing around there" (1 R.T. 17), thereby convincingly refuting Officer Farr's account. Officer Adams' subsequent testimony, it may be recalled, conclusively establishes,

by the Government's own admission, that due to his "inexperience" (2 R.T. 12), this officer went in a direction contrary to the orders of Officer Farr, and upon returning to the police wagon a few minutes later, agreed he had no knowledge of the events which transpired after his initial disembarkation from the police car (1 R.T. 19 -20, 27-28, 32-33).

In sum, it is submitted that the basic inconsistency underlying the officers' testimony inconclusively establishes appellants' guilt of second degree burglary. On the contrary, it confirms the basic defect present in this case: the unestablished proposition that these were the only two suspects of at least two more unidentified suspects who were successfully apprehended; therefore, they must have had their hands through the window. Such an inference of guilt, coupled with prejudicial prosecutorial remarks and clearly erroneous flight and missing witness instructions, discussed infra, is clearly insufficient to establish the basic elements of second degree burglary, and submitting such evidence to the jury was reversible error.

B. THE PROSECUTOR'S CLOSING ARGUMENT EXCEEDED PERMISSIBLE BOUNDS AND THUS WAS "PLAIN ERROR" REQUIRING REVERSAL.

It is settled in this jurisdiction that "whether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt" (Corley v. United States,

124 U.S. App. D.C. 351, 352, 365 F.2d 884, 885 (1966), quoting from Jones v. United States, 119 U.S. App. D.C. 213, 214, n. 3, 338 F.2d 553, n. 3 (1964). Appellants contend that in addition to the weaknesses of the Government's evidence pertaining to their guilt -- See Argument A, supra -- the prosecutor's statements went beyond the bounds of propriety and created such a prejudicial environment as to deny them a fair trial.

Of particular concern among the many prosecutorial remarks made in his closing arguments is the following statement: "If you find that it happened to /sic/ way Mr. White says it happened then Mr. Adams and Mr. Farr are out-and-out liers /sic/. (2 R.T. 31). Moreover, counsel stated, inter alia:

> Now, there are times when police work is not very fruitful. There are times when a crime like a burglary takes an awful long time. There is a lot of difficult police work.
>
> Every now and then the police department is lucky enough to catch somebody right in the act, and catch them red-handed as the saying goes. That is precisely what we have here. When you come to weigh the facts against the elements, when you come to think about those intangibles in connection with the facts and the elements, there can be no real doubt in this case that these people were caught red-handed in the act of taking the property out of the jewelry store, and we suggest that you reach a proper verdict * * *. /2 R.T. 167 6/

6/ Several other examples are found in the record where the prosecutor varied from the universally accepted and proper form of comment on the contradictions in testimony discussed infra. For example, those comments considered improper include: "If you believe that, this man deserves to go free" (2 R.T. 27); "If you want to believe that /appellants/ didn't come here and contd.

In attacking the veracity of appellants so directly, the challenged statements clearly exceeded the standards of argument for counsel set by this Court in Gibson v. United States, ___ U.S. App. D.C. ___, 403 F.2d 569, 570, n. 1 (1968). In Gibson, this Court reviewed a similar closing argument of the prosecutor who had stated to the jury: "I tell you ladies and gentlemen his whole testimony here, tailored to meet the Government's case, is a recent fabrication designed to lure you and hoodwink you * * *" (Ibid.; emphasis the Court's). Speaking for the Court, Judge (now Chief Justice) Burger, set forth the following standard for closing argument of counsel:

> * * * we take occasion to emphasize that this was an impermissible statement; no evidence warranted this opinion-conclusion of the prosecutor. The truth or falsity of testimony is exclusively for the jury. Counsel may question whether witnesses are telling the truth but only if they remind the jury that credibility is for them alone; e.g., "I call your attention to the testimony of witnesses X and Y and ask you to consider carefully whether they were telling the truth. If they were, then the complaining witness and his mother were lying. You must decide which to believe." This form is permissible * * *. [Ibid.; emphasis the Court's]

6/ contd. in effect perjure themselves to that extent, you can believe that and let them walk out of here" (2 R.T. 32). Moreover, in commenting on the evidence relating to the transfer of personal items from Mr. White to Miss Brewer, the prosecutor stated: "That it is a might strange transfer to have occurred with a co-worker of yours at 5:00 o'clock in the morning. That [sic] about that question. If you answer that you are better than I am" (2 R.T. 30).

Thus, the cumulative effect of the aforementioned statements was to "divert the focus of the jury's consideration of the case from the facts in evidence to the attorney's personal evaluations of the weight of the evidence." The remarks patently constituted an opinion of appellants' veracity "in circumstances where veracity may determine the ultimate issue of guilt or innocence," being merely "another way of saying the accused was guilty in the prosecutor's opinion" (Harris v. United States, ___ U.S. App. D.C. ___, 402 F.2d 656, 658-659, n. 3 (1968)). 7/ A more likely interpretation of the prosecutor's remarks, as the First Circuit has observed, is that they were a "back-handed way of laying one's credibility on the line. Prosecuting attorneys and law enforcement officials wear an invisible cloak of credibility by virtue of their position" (Patriarca v. United States, 402 F.2d 314, at 321 (1st Cir. 1968)). 8/

7/ Compounding the error was the prosecution's introduction of the theory of "joint action" for the first time on rebuttal, although no evidence or testimony had been adduced on this point by the Government earlier in the trial. By prejudicially linking appellants in this manner, the comments possibly contributed substantially to their convictions which this Court has held sufficient to justify reversal. See Moore v. United States, 120 U.S. App. D.C. 173, 344 F.2d 558 (1965). Cf. Reichert v. United States, 123 U.S. App. D.C. 294, 359 F.2d 275 (1966). Similarly, it would appear that in view of the lower court's rejection of the Government's attempt to impeach appellants' testimony by introducing prior convictions under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), the prosecutor was seeking to shore up the weaknesses of his case on closing argument.

8/ See also Cross v. United States, 122 U.S. App. D.C. 283, 285, 353 F.2d 454, 455-456 (1965) where this Court reiterated the oft-stated cautionary warning that "While a prosecutor must be given some leeway in argument, it is not the heat but the light of argument that is the objective. The prosecutor's task is to fight with hard but not foul blows."

Clearly then, the judge's charge could not and did not sufficiently repair the damage to remove the prosecutor's statements from constituting reversable error. In these circumstances, "prejudice to the cause of the /appellants/ is so highly probable" that this Court, reviewing the case on appeal, is "not justified in assuming its non-existence" (Corley v. United States, supra, 124 U.S. App. D.C. at 352, 365 F.2d at 335 (1966), quoting from Berger v. United States, 295 U.S. 78, 89 (1935). See also Jones v. United States, supra.

In the face of the record presented, appellants submit the challenged statements constitute "plain error" affecting their substantial rights to a fair trial and justifying reversal of the lower court's judgment under Fed. R. Crim. P. 52(b). 2/

2/ Federal Rules of Criminal Procedure - Rule 52(b):

"PLAIN ERROR. Plain error or defects affecting circumstantial rights may be noticed although they were not brought to the attention of the court."

C. FAILURE TO SHOW THAT APPELLANT WHITE'S MISSING WITNESSES WERE NOT EQUALLY AVAILABLE TO THE GOVERNMENT PRECLUDED THE LOWER COURT FROM CHARGING THE JURY WITH THE MISSING WITNESS INSTRUCTION.

This Court only recently had occasion to fully review the circumstances under which a missing witness instruction was erroneously given a jury. See Brown v. United States, ___ U.S. App. D.C. ___, ___ F.2d___ (No. 21,665, decided June 11, 1969). In Brown, the appellant, in response to the judge's questioning, answered that the missing witness was "at work," to which the judge replied: "He's at work, yes; so you know where he is" (slip op. at 5). In the absence of a showing to the contrary -- that the witness was unavailable to the Government -- submitting the missing witness instruction to the jury was held to be error. This Court explained in Brown:

> Thus before a missing witness instruction can be given against a defendant there must be a showing that the witness was not available to be subpoenaed by the Government. In the recent case of Wynn v. United States, U.S. App. D.C. ___, ___ n.23, 397 F.2d 621, 625-626 n.23 (1967), we reiterated this requirement, noting there the absence of certain critical facts:
>
> > "Among the circumstances which do not appear are the extent of appellant's knowledge of the whereabouts of the witnesses at the time of trial; their then physical amenability to subpoena; and, on the other hand, the Government's opportunities to itself call them after learning of their identity, either before or during trial. ***"

> The trial judge should make an inquiry on this point before giving the instruction. See Stewart v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,983, decided February 10, 1969). /Slip op. at 5; emphasis supplied/

Measured against these standards, it is clear the instruction should not have been given the jury, for none of the requirements elucidated in Brown was met. Miss Brewer and Mr. Burke, the potential witnesses, were not shown to be "not available to be subpoenaed by the Government." After learning of their identity and location during trial,[10] the Government made no effort to call them. Moreover, the lower court made no inquiry on this point before giving the instruction.[11]

In addition, the general nature of the court's instruction was not sufficiently precise to eliminate possible confusion by the jury that it was not equally applicable to Mr. Stevenson who, in a legal sense, stood as a total stranger to these persons. Notwithstanding the Government's allegation for the first time in its rebuttal on closing argument that the activities of appellants constituted "joint action" (2 R.T. 31-32), the record is void of any proof of such a charge. No testimony was offered or elicited on cross-examination impli-

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10/ See Statement of the Case, supra, pp. 6-7.

11/ During the argument concerning the applicability of this instruction, no further inquiry was made as to the witnesses' availability. See 2 R.T. 3,15.

cating Mr. Stevenson with MissBrewer or Mr. Burke. Thus, absent needed clarification,[12] the lower court's instruction failed to disassociate the missing witnesses from Mr. Stevenson, thereby placing him in a prejudicial posture. The cumulative effects of the generalized instruction are no more forcefully illustrated than by the prosecutor's closing argument to the jury:

> Further in way of intangibles, there is something else you haveheard. You have heard a lot about MissBrewer. But, Verda Brewer never came forth to testify. She could shed light on what happened at 14th and U. Mr. White indicated that he could locate her, that he knew where she worked and he had in fact about a month ago been over to her house and talked to her. You can consider that in addition to other things in assessing the guilt of Mr. White and Mr. Stevenson.
>
> /2 R.T. 15-16; emphasis supplied/

It is submitted, therefore, that the court's failure to make inquiry as to the availability of Miss Brewer to Mr. Stevenson, coupled with its failure to emphasize this point to the jury, was highly prejudicial and was not rectified by the generalized missing witness instruction.[12]

12/ The trial court's missing witness instruction was,"If a witness who could have given material testimony on an issue in this case was peculiarly available to one party, was not called by the party and his or her absence has not been sfficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony of the witness would have been unfavorable to the party which failed to call him or her" (2 R.T. 37-38).

. . .

D. THE LOWER COURT'S "FLIGHT" INSTRUCTION, BY OMITTING A FULL EXPLANATION OF THE VARIETY OF MOTIVES WHICH MIGHT PROMPT FLIGHT, WAS INADEQUATE AND ERRONEOUS.

That the lower court's "flight" instruction[13/] -- identical in all pertinent respects to the instruction reviewed recently by this Court is "inadequate and erroneous" is now clearly established. See Austin v. United States, ___ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,044, decided May 27, 1969). See also Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963), cited approvingly in Austin; and Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954), cited with approval by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 483, n. 10 (1963).

In alluding to the "variety of motives which might prompt flight," this Court emphasized that "Wong Sun and Miller have pointed inescapably to the fact that flight instructions should be used sparsely, and when used should be accompanied by a full explanation by the judge" (Austin, supra, slip op. at 4).

Like the identical instruction given in Austin, the instant instruction fell short of "full explanation." Indeed, according to the police officers' testimony, their sudden appearance on the scene, hooking in front of the trailer truck perpendicular ·

13/ The lower court's flight instruction: "Flight by the defendant or defendants, after a crime has been committed, does not create a presumption of guilt. You may consider evidence of flight, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight by the defendant or defendants in connection with all of the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive" (2 R.T. 46).

to the curb, with brakes squealing and lights shining on the store front, would clearly cause any reasonable man to react in instant horror and fear and prompt his flight, regardless of his consciousness of guilt. As each appellant testified they denied breaking or entering into the jewelry store. Several alternate possibilities could have conceivably existed at the moment of the arrival of the police: The appellants may have arrived on the scene at the conclusion of the apparent burglary and larceny; or one or both of the appellants may have entertained thoughts of joining the crimes in progress but were curtailed by the police confrontation; fear resulting from the suddeness of a police vehicle descending upon them during the early morning hours could have prompted flight during that period of uncertainty and tension in the District of Columbia. In sum, it is clear that the failure of the lower court to offer a full explanation to the jury of the variety of probable motives of the appellants' flight constituted plain error and rendered the instruction inadequate justifying reversal in this case.

CONCLUSION

The weakness of the Government's factual case against the appellants, coupled with a cumulative series of prejudicial errors, denied each appellant a fair trial. Moreover, the uncorrected errors as to each appellant, individually and jointly, became inextricably intertwined,

resulting in the creation of unfair and insurmountable obstacles to appellants obtaining their basic right to a fair trial. Accordingly, appellants submit their respective convictions must be reversed and the trial court directed to enter a judgment of acquittal or, in the alternative, to remand the case and order new trials for each appellant.

Respectfully submitted,

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Suite 203 Davis Building
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(Appointed by this Court)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee	)	
v.	)	No. 22924
IRVIN L. STEVENSON and BERNARD I. WHITE, Appellants	)	No. 22925

CERTIFICATE OF SERVICE

I hereby certify that on the day of September 1969, I have served the Honorable Thomas A. Flannery, United States Attorney for the District of Columbia, Washington, D.C., with a printed copy of the brief in this appeal by mail postage prepaid.

JOEL CHASNOFF
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(By appointment of this Court)